IAS

LWM

REQUEST FOR COMMENTS/TSD ON STATE IMPLEMENTATION PLAN REVISIONS

TO:

____	AIR PLANNING SECTION	____	AIR COMPLIANCE BRANCH
/	TECHNICAL ANALYSIS SECTION	____	ENVIRONMENTAL SERVICES DIV.
/	REGIONAL COUNSEL	____	DIVISION DIRECTOR, AMD
____	STATE SPECIALIST	/	BRANCH CHIEF, ARB
/	REGULATORY ANALYSIS SECTION	____	STATE COORDINATOR
/	REGULATORY SPECIALIST	/	DOCKET COPY one FILE COPY
____	WRITER ____	____	PIRU, CPDD, OGC, SSCD, FOSD, OP&E, ECTD, OFR, STATE
____	OTHER ____		

FROM: R.Cano, REGULATORY SPECIALIST: ____

DATE: 2-18-86, PHONE: 8866035

PLEASE REVIEW AND PROVIDE COMMENTS/TSD BY DUE DATE. IF YOU HAVE NO COMMENTS PLEASE CHECK HERE AND RETURN: ____, DATE: ____

SUBMITTAL DESCRIPTION

DOCKET NO. AND TITLE: A240 / Particulate emission limits

STATE: X ILL, ____ IND, ____ MICH, ____ MINN, ____ OHIO, ____ WISC, ____ OTHER:

AREA: ____ STATEWIDE, ____ AREA SPECIFIC, ____ SITE SPECIFIC, ____ OTHER:

TYPE OF SUBMITTAL: X PART D, ____ SITE SPECIFIC, ____ MISC.

STATE OF DEVELOPMENT: X DRAFT, ____ FINAL, ____ OTHER:

POLLUTANT: ___ O_3, ___ CO, X TSP, ___ SO_2, ___ VOC, ___ NO_2, ___ Pb, ____ OTHER:

SUBMITTED BY: ____, COVER LETTER DATE: ____, DATE RECEIVED: ____

RC/ACB/ESD/DUE DATE: ____

____ TO PREPARE TSD BY ____ (DATE)

SPECIAL NOTE:

BT
2-14-86
JH

The Board has denied the IEPA's Request to ESTABLISH A Separate docket For the OPACITY ISSUE. IF the Board continues in its Attempt to Block the USE OF opacity limits As An ENFORCEMENT TOOL, we will be unable to Approve this regulation. A letter to Mr Jacob D. Dumelle is being Prepared.

Done

TRANSMIT A COPY OF YOUR COMMENTS TO: GARY GULEZIAN
cc: UYLAINE MCMAHAN
AIR AND RADIATION BRANCH
PHONE: 353-0396

CREATE RAS AND DOCKET FILES ____

SUBMIT ORIGINAL TO RAS FILES NO. IL240 / DOCKET FILE NO. A240

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

cc: Bob, Dennis, KRCB

MEMORANDUM

TO: Dave Kee

DATE: 2/5/86

FROM: Ruby Hayes

☑ Information only

SUBJECT: Illinois Opacity Regulations

☐ Response requested

Here is a copy of the industry response to the Agency motions that were included with the material I sent to you on Monday, and the Agency's motion to establish a separate docket for the opacity regulations.

There is some chance that the Board may not go through with its proposal in the "second" second notice to drop the opacity standard - we'll know Thursday.

Noted in the industry motion (response to our motion) that industry is characterizing the process of federal review of state regulations in a way (which ties) to appeal to the Board's (and everyone's, including USEPA) frustration with the SIP process: "... making USEPA happy ...". I think we will be hearing that more and more on the RACT proceedings - our job will be to point out that Illinois is a part of the United States, after all, and that the Board has to consider clean air Act requirements in deciding on our regulations, and that USEPA review is after all required by

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

MEMORANDUM

TO: _____ DATE: _____

FROM: _____ ☐ Information only

SUBJECT: _____ ☐ Response requested

the Clean Air Act.

One issue we haven't brought up yet is that opacity has a value independently of the mass emission limit for particulates, which is the esthetics of good visibility during conditions of low opacity. That we will do in the additional hearings on this rule, if there are additional hearings held. Also we will want USEPA testimony to be made available on the requirement for opacity standards.

The Board decision on Thursday is obviously going to be a very important one. All we can do now is wait and see.

IL 532-0571
EPA 90A 6/75

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
PARTICULATE EMISSION LIMITATIONS RULE 203 (g)(1) and 202(b) of CHAPTER 2	)	R82-1

N O T I C E

TO:

Dorothy Gunn, Clerk
Ill. Pollution Control Board
100 West Randolph
Suite 11-500
Chicago, Illinois 60601

Harvey Sheldon
Coffield, Ungaretti,
Harris & Slavin
3500 Three First
National Plaza
Chicago, Illinois 60602

John L. Parker
John L. Parker & Assoc., Ltd.
39 South LaSalle Street
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Chicago, Illinois 60603

C. L. McDonough
Director of Air Quality
Commonwealth Edison Comp.
P. O. Box 767
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Robert E. Miller
Central Ill. Light Comp.
300 Liberty Street
Peoria, Illinois 61602

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7200 Sears Tower
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W.P. Hagenbach
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George E. Bullwinkel
Burditt, Bowles & Radzius, Ltd.
333 West Wacker Drive
19th Floor
Chicago, Illinois 60606

Van Esser
Policy & Planning Comm.
Ill. Dept. of Energy &
Natural Resources
325 West Adams Street
Springfield, Illinois 62706

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board the Motion to Establish Separate Docket, to Reopen the Record and to Schedule Hearing on Section 212.123 of the Illinois Environmental Protection Agency, a copy of which is herewith served upon you.

ENVIRONMENTAL PROTECTION AGENCY
OF THE STATE OF ILLINOIS

BY: Mary V Rehmann
Mary V. Rehmann
Attorney
Enforcement Programs

DATE: February 4, 1986
Agency File #: 6340
2200 Churchill Road
Springfield, Illinois 62706
217/782-5544

BEFORE THE POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
PARTICULATE EMISSION LIMITATIONS	)	R82-1
RULE 203(g)(1) and 202(b) OF	)	
CHAPTER 2	)	

MOTION TO ESTABLISH SEPARATE DOCKET, TO REOPEN THE RECORD, AND TO SCHEDULE HEARINGS ON SECTION 212.123

The Environmental Protection Agency (Agency) hereby moves the Pollution Control Board (Board) to establish a separate docket in this proceeding for 35 Ill. Adm. Code 212.123, to reopen the record on this section, and to set a hearing in order to take testimony on the language as proposed for Second Notice.

The Board has adopted five orders containing proposed language for the opacity standard in this proceeding. In four of those orders adopted on January 21, 1982, on July 19 and on December 6, 1985, and on May 16, 1985, the proposed language was, substantively, the same as Rule 202 which was struck down by the Illinois Supreme Court. Now, with the merit record in the proceeding closed, the Board has proposed a major revision of the regulation in the "Second" Second Notice Order.

Section 5.01 of the Administrative Procedure Act (Ill. Rev. Stat. 1983, ch. 127, par. 1005.01) (APA) requires that an adopting agency give notice of its intended rulemaking action in the First Notice period. It is to be expected that amendments, based on public comment, will be made prior to the Second Notice. However, where such amendments change the substance of the proposed regulation, an agency has failed to give the notice which complies with Section 5.01. The Agency finds the modified opacity regulation such a substantive change in that the opacity standard is no longer an enforceable limitation on its face. Therefore, the Board has failed to give adequate

notice of its intention so as to allow the necessary public comment and to comply with the APA.

In its two Motions for Reconsideration, filed on December 31, 1985 and January 16, 1986, the Agency has described impacts of the modified language which have not been addressed on the record due to the fact that no notice was given that the Board intended to make such a significant change. Since the Agency considers these impacts so important, particularly as related to the submission of Section 212.123 for approval by the U.S. Environmental Protection Agency (USEPA) as part of the State Implementation Plan (SIP), the Agency urges the Board to proceed with final adoption of the particulate emissions standards and to reopen the record on the opacity standards.

This proceeding alone has been in progress for more than four years. Further, it is one of a series of actions to replace the particulate standards which were remanded a decade ago. Neither the Board, the Agency nor the people of the state can afford to lose all of the efforts put in thus far by failing to consider fully the impacts of the change in the regulation as adopted in the "Second" Second Notice Order.

In support of this Motion, the Agency states the following:

1. This proceeding was initiated by the Board on January 21, 1982 by publication of proposed Rule 202(b) as follows:

> Rule 202(b). Visual Emission Standards and Limitations for all Other Emission Sources.
>
> No person shall cause or allow the emission of smoke or other particulate matter from any other emission source into the atmosphere of an opacity greater than 30 percent.
>
> Exception: The emission of smoke or other particulate matter from any such emission source may have an opacity greater than

> 30 percent but not greater than 60 percent for a period or periods aggregating 8 minutes in any 60 minute period provided that such more opaque emissions permitted during any 60 minute period shall occur from only one such emission source located within a 1,000 foot radius from the center point of any other such emission source owned or operated by such person, and provided further that such more opaque emissions permitted from each such emission source shall be limited to 3 times in any 24 hour period.

2. The proposed adoption of Rule 202(b) was in response to the voidance of this rule by the Illinois Supreme Court because of the rule's association with Rule 203(g)(1)(C) which had been remanded by the same court. Pursuant to the latter regulation, any source cited for a violation of the opacity standard of Rule 202(b) could demonstrate, as a defense, that it was in compliance with the applicable mass emission limitations. Since the courts had remanded to the Board the particulate regulations for solid-fuel burning sources (now regulated under 35 Ill. Adm. Code: Subpart E) because of procedural errors in their adoption, the Illinois Supreme Court concluded that it was impossible for sources subject to Subpart E to demonstrate compliance with the mass emission limitations as a defense against alleged opacity violations. Therefore, the court stated that "the earlier invalidation of Rule 203(g)(1) requires the invalidation of Rule 202 insofar as it applies to emission sources governed by Rule 203(g)(1) because of that relationship." (The Celotex Corporation v. The Pollution Control Board, 445 NE2d 752 at 760, (1983)).

3. The modified language in the "Second" Second Notice Order of December 20, 1985, for all practical purposes, eliminates the opacity limitation as an enforcement tool for numerous categories of particulate emissions sources. In addition to applying to sources regulated by Subpart E of Part 212, Section 212.123 applies to incinerators, regulated by Subpart D; to process emission sources, regulated by Subpart L; to food manufacturing sources, regulated by

Subpart N; to petroleum and chemical manufacturing sources, regulated by Subpart O; and to some metal product manufacturing sources regulated pursuant to Subpart S. The opacity limitation, as applied to these sources, has neither been struck down by any court nor repealed by the Board. Yet the proposed language in the "Second" Second Notice Order would remove the enforcement tool routinely available to anyone for insuring compliance of these sources with the particulate standards. The opacity limitations are particularly important as related to incinerators and to process sources, among which are numerous metallurgical sources and asphalt plants.

The impact of the proposed change on these additional sources is totally missing from the record in this proceeding because the Agency, as well as owners and operators of these sources, had no notice of any intention by the Board to change the regulation in any substantive way. Although one can say that, once a regulation is proposed for amendment, all possible revisions are fair game, the Agency would respond that administrative law prescribes certain safeguards. A First Notice which shows the intended action of the adopting agency is one of the most important safeguards.

4. Removing opacity as an enforceable limitation for the sources affected by Section 212.123 puts these sources in a special category as compared with sources which are subject to enforceable opacity limitations under Board or federal regulations. Several related impacts can be described .

a. In making exceedances of the opacity limit subject only to the Agency's authority to impose permit conditions requiring monitoring

and reporting, the violations may not be cited by anyone in enforcement proceedings. When adopting the opacity standard in R71-23, the Board stated "...in many cases the appearance of an opaque plume may be the best available evidence of improper operation. With all its drawbacks, therefore, the visual standard is an indispensable enforcement tool....For these reasons, as well as the encouragement of citizen participation in bringing pollution cases, we have retained and broadened the APCB prohibition on excessive visible emissions." (4 PCB 309-310). Citizen complaints based on opacity violations have been, historically, an important opportunity for public involvement in enforcement of the particulate standards. During periods when public moneys for enforcing environmental laws are being reduced, it becomes more imperative than ever that enforcement options be kept as broad as possible.

b. The Board stated in its opinion of December 20, 1985, that it has modified the opacity rule so as to "use opacity violations as a qualitative indicator of operating situations which should be investigated and as a basis for imposing monitoring or reporting requirements in permits, but not as a means to impose civil or criminal penalties." This amendatory action segregates the sources subject to Section 212.123 by reducing the Board's remedies in enforcement cases against these sources as compared with other sources subject to opacity limitations. The Board is well aware that no civil or criminal penalties are imposed without due process of

law, whether the proceeding be administrative or judicial. As the finder of fact, both the Board and court have to be convinced by the petitioner that a violation exists, despite all the defenses raised by the respondent. As regards the allegations by Electric Energy Inc. (EEI) and Illinois Power Co. (IPC) that it would be unconstitutional for the Board to adopt an opacity limit which, when exceeded, may not coincide with a violation of the mass emissions standard, the federal courts have dealt with the question. The U.S. Court of Appeals for the D.C. circiut addressed the question, "How can plume opacity be (a) valid standard when pollution and plume opacity can not be reliably correlated and evaluations of the same plume by several qualified observers will vary substantially?" Having considered the USEPA Administrator's analysis in adopting an opacity limitation as part of a New Source Performance Standard for Portland cement plants, the court concluded "We are not warranted on the basis of his analysis to find that plume opacity is too unreliable to be used either as a measure of pollution or as an aid in controlling emissions". (Portland Cement Association v. Train, 513 F2d, 506 at 508.(1975)).

c. The absence of an enforceable opacity limitation in Illinois regulations results in the sources subject to Section 212.123 being treated differently from similar sources in other states. All of the other states in USEPA Region V have opacity limitations for sources regulated by Section 212.123. Michigan, Minnesota, Ohio and

Wisconsin have general opacity limits of 20%. All but Michigan have provision for an adjusted standard to correspond with observed readings during compliance tests. Michigan has no associated linkage with the particulate standards at all. Indiana has a general 30% limit in nonattainment areas and 40% in attainment areas. The Indiana regulations further state that violation of the opacity limit is prima facie evidence of violation of the particulate limitations, although there is a special provision for setting limits during compliance tests.

d. Finally, abandoning the opacity limitation as an enforcement tool at this time is completely at odds with the trend in the regulation of new sources. A survey of the New Source Performance Standards (NSPS), which are adopted by the Board without change, reveals that opacity limitations are the rule rather than the exception. (See 40 CFR 60, Subparts D, D_a, D_b, F, G, H, I, J, L, M, N, O, P, Q, R, S, Y, Z, AA, BB, DD, HH, KK, LL, NN, PP, and UU.).

5. If the Board adopts the opacity regulation as proposed in the "Second" Second Notice Order, the Agency has been advised that it will not be approved by the USEPA because it is not a visible emissions limitation which, if approved as part of the SIP, will be federally enforceable. The evidence, based on previous Board regulations as well as regulations adopted by other states, supports the position that visible emission limitations are appropriate for all of the sources affected by Section 212.123. Therefore, the regulation

does not meet the requirements of 40 CFR 51.19(c) which states that each State Implementation Plan shall provide for "Establishment of a system for detecting violations of any rules and regulations through the enforcement of appropriate visible emissions limitations...." This means that the efforts of more than four years in trying to cure the defect in the Illinois regulations will have been for nought in relation to meeting the state's obligations under the Clean Air Act. Neither, the Board nor the Agency can justify such a waste of effort.

Respectfully submitted,
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

Mary V. Rehmann

Mary V. Rehmann
Attorney at Law
Enforcement Programs

Date: February 4, 1986

2200 Churchill Road
Springfield, IL 62706
217/782-5544

MR:rmi/0278F/18-25

STATE OF ILLINOIS)
) SS
COUNTY OF SANGAMON)

PROOF OF SERVICE

I, the undersigned, on oath state that I have served the attached Motion to Establsih Separate Docket, to Reopen the Record and Schedule Hearing on Section 212.123 upon the person to whom it is directed, by placing a copy in an envelope addressed to:

SEE ATTACHED NOTICE LIST.

and sending it by first class mail from Springfield, Illinois, on February 4, 19 86, with sufficient postage affixed.

Deborah M. Stoll
Deborah M. Stoll

SUBSCRIBED AND SWORN TO BEFORE ME
this 4th day of February 1986.

Barbara K. McGee
Notary Public

IL 532-0917
EPA 136 2/82

018-003

Dick Hazen

BEFORE THE
ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	R82-1
PARTICULATE EMISSION LIMITATIONS, RULE 203(g)(1) and 202(b) OF CHAPTER 2	)	

RESPONSE TO MOTION TO
RECONSIDER SECOND NOTICE ORDER
AND TO MOTION TO
FURTHER RECONSIDER SECOND NOTICE

Electric Energy, Inc. ("EEI") and Illinois Power Company Company ("IPC") hereby jointly respond to the Motion to Reconsider Second Notice Order ("First Motion") filed herein by the Illinois Environmental Protection Agency ("IEPA") dated December 31, 1985 and the Motion to Further Reconsider Second Notice Order ("Second Motion") filed herein by IEPA and dated January 16, 1986.

At the very outset, one critical fact must be emphasized. The Board's Second Second Notice (December 20, 1985) added to the previous version (May 16, 1985) of Section 212.123(a) a limitation on the applicability of that section so that an exceedance of the opacity limitation contained in that section could only be used for establishing permit monitoring and reporting requirements. (Hereafter, that limitation will be referred to as the "Proviso.") As explained in the accompanying Opinion (at 2-3), the Board recognized that there was not a perfect correlation between opacity and particulate emissions. The record here, not only by the testimony submitted on behalf of EEI and IPC but also in the cross-examination of the IEPA's witness, establishes that sources can exceed the opacity limit without violating

the particulate standard. As opacity has no independent justification, but is only a surrogate for particulates, to impose civil and criminal penalties for violations of the surrogate when the particulate standard will not be violated would be legally, constitutionally invalid. While the Board's Opinion recognized and dealt with this unavoidable problem, neither of the IEPA's motions has even attempted to address it. EEI and IPC below will address both of IEPA's motions, but this salient factor, more than anything else necessitates rejection of all of the IEPA's suggestions.

FIRST MOTION

The IEPA's First Motion initially suggests deleting the Proviso that the Board added to Section 212.123 or, in the alternative, requests that the Board return to First Notice to allow further comment. The IEPA's First Motion then contains five numbered paragraphs in support but it is difficult for EEI and IPC to determine which paragraph supports which alternative. Therefore, EEI and IPC will address the five in order.

1. The first paragraph of IEPA's First Motion raises no substantive objection to the Board's action but, rather, appears to raise a procedural objection. IEPA apparently is contending that, because Section 212.123(a) in the Second Second Notice differs from the version in the Second First Notice (May 16, 1985), the Board has violated the Administrative Procedure Act ("APA"). The APA explicitly requires an opportunity for public comment; implicitly it also requires the rulemaking body to consider any comments received. Logically, if meritorious comments are received, although again not explicit in the APA, the proposed rules should be revised. The reducto ad absurdum of the IEPA's contention is that every time a rulemaking body, based on public comments or its own analysis, wants to make a change in a First

Notice rule, it must again go to first notice in what could be an almost unending process, continuing until either the body rejects all comments or receives no further comments so that the last First and the Second Notice rules are identical. The APA contains no such requirement and to infer one, which would contradict or, at least, subvert the implicit requirement to consider and act on meritorious comments, is without any logical or legal support. The Board may, as a matter of discretion, do this but it is not required by the APA.

2. The second paragraph of IEPA's First Motion raises the same procedural objection but based on a different factual premise. The procedural objection, as discussed in paragraph 1, is without merit.

The factual premise for the argument is that the opacity provision now will apply only to sources required to have permits. First, EEI and IPC have no knowledge how many, if any, sources subject to this opacity provision are exempt from permitting; the IEPA's silence is, however, suggestive. Second, and more significantly, IEPA does not contradict the Board's conclusion that IEPA "does not enforce on the basis of opacity violations alone." (Opinion at 2) Thus, whatever enforcement basis the IEPA has used for sources not required to have permits is still open to IEPA. Furthermore, even if IEPA's reading of the Proviso is correct, that the entire section now only applies to sources with permits and that this is somehow a problem, neither of the IEPA's alternatives is a solution. Deletion of the Proviso, making this again a criminally and civilly enforceable standard, raises the very problems the Board recognized and corrected. IEPA's alternative, returning to First Notice may lead to further comment but it is difficult to see how this will cure either problem.

EEI and IPC would suggest, as they have previously, that deletion of the entire section is appropriate and would cure the IEPA's concern. Since IEPA does not, by itself, base enforcement solely on opacity, it could then continue to use opacity for surveillance and in combination with whatever other techniques IEPA relies upon.

3. While EEI and IPC do not totally disagree with IEPA, that there may have been some clearer way for the Board to state the result it has reached, the deletion of the Proviso would raise a different, more serious problem and IEPA has made no suggestion for clarification. EEI and IPC do agree, based on both the language of Section 212.123 and the Opinion, with IEPA's statement that the opacity provision is not and is not intended to be an enforceable (subject to civil and criminal penalties) standard. Based on the record before the Board and the significant constitutional objections that would arise from the opposite result, the Board's resolution is justified and appropriate. Deletion of the Proviso as IEPA suggests would raise those constitutional infirmities; further comment can not avoid that problem.

To the extent there is a concern with the clarity of the provision, EEI and IPC again suggest the simplest solution is to delete the entire section. The IEPA would then have available, without the question of interpreting this specific language, whatever surveillance techniques are appropriate.

4. EEI and IPC find the fourth paragraph of IEPA's Motion is speculative but probably wrong. What is important to recognize, as the Board has in its Opinion, is that opacity is merely a surrogate for particulates and the sources that would be subject to opacity are (or shortly will be) subject to a particulate standard. It is difficult to see how IEPA's investigation, inspection, surveillance or enforcement

authority is expanded by a surrogate standard so long as the pollutant of concern, particulates, is regulated.

5. The fifth paragraph of IEPA's First Motion raises the now, almost standard in terrorem argument -- "USEPA won't like this." There are two responses. First, it is the Board's responsibility to develop regulations justified on the legal and factual record before it. The Board has done so here. It is not this Board's function to make USEPA happy where that result is unjustifiable.* Once the Board has completed its work, it is then IEPA's responsibility not merely to present the result to USEPA but, if you will, "sell" that result. At the USEPA level, IEPA is the advocate for the state's program and EEI and IPC submit that there is more than an adequate basis for IEPA to do this job.

The second response to this concern of IEPA, as EEI and IPC have stated previously in this proceeding, is that opacity is not a regulated pollutant. One of the most recent environmental decisions of the Seventh Circuit, although it did not involve the fuel combustion sources of concern to EEI and IPC, clearly recognized this:

> Though a measure of unsightliness, opacity is not a form of pollution regulated by federal law.

Bethlehem Steel Corporation v. U. S. E.P.A., ___F.2d___, Slip Op. at 5 (Nos. 84-1168, 84-1182 and 84-1196, 7th Cir., January 3, 1986. Emphasis added.)

Based on the foregoing, the Board should reject the IEPA's First Motion. The IEPA's alternative of accepting additional comments is not required by the APA

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*EEI and IPC would note, if USEPA's happiness were a legitimate concern, than adopting regulations that again could be judicially set aside probably would not make USEPA happy either.

and the IEPA has advanced no other, sound reason to do so. The IEPA's alternative of deleting the Proviso must be rejected because that result would make the section legally invalid and unjustified on the record.

SECOND MOTION

The IEPA's Second Motion further expands on its in terrorem argument and raises, without any follow through, a possible distinction between different types of sources subject to Section 212.123(a). Finally, IEPA suggests revised language for this section which is really nothing more than a return to the previous provision which the Board has justifiably rejected. Glaring, by its absence, is any discussion of the one problem the Board had to address - - it cannot make a source subject to civil and criminal penalties for violating a surrogate standard if that violation is not unequivocably also a violation of the particulate standard. Even if IEPA's arguments were completely valid, this infirmity in IEPA's suggestion cannot be overcome.

IEPA states, in the first paragraph of the Second Motion, that some unknown, unidentified employee of USEPA has advised IEPA of the language of 40 C.F.R. 51.19(a). A careful reading of that paragraph of the Second Motion contains no analysis, either by IEPA or the unknown source at USEPA, of what that language means. In the second paragraph of the Second Motion, the Board is told that this unknown source at USEPA said the Second Second Notice will not satisfy 40 C.F.R. 51.19(c) although as presented by IEPA, it is unclear whether the alleged infirmity is inherent or merely because of the limitation to permitted sources. If the latter, EEI and IPC's earlier suggestion, to delete the entire section will cure that problem.

EEI and IPC have several serious problems with the approach taken by IEPA.

First, it is hearsay of the absolute worst kind. Except that someone employed by USEPA was contacted, neither EEI and IPC nor the Board have any idea who this person was; whether he has the authority to interpret regulations, USEPA's or the Board's; whether he has the knowledge, expertise or experience to do so. Equally significant is that we have no idea how or what questions were put to this USEPA employee; the answers one gets very often depends on the questions one asks. For instance, was he asked how to deal with a surrogate standard that, from the testimony of all parties, has been shown to be inaccurate. For these reasons, USEPA's alleged views as stated by IEPA can have little, if any, probative value.

Even if the concerns expressed above were addressed, those views were never tested in the hearing process which really raises a far more fundamental, and distressing concern with IEPA's approach. What IEPA is really telling this Board is "ignore your statutory requirements, ignore your procedures, ignore the record and just do what we tell you or what we tell you USEPA allegedly requires." This approach is not only a subversion of the requirements placed on the Board for rule-making, it is a subversion of IEPA's role in both the rule-making process and in the interface with USEPA. In the rule-making process, if IEPA believes something is necessary or required it has the obligation to help develop the record to support that result. At the USEPA level, IEPA's function is to use its best efforts to obtain approval for the results the Board reaches.

Here its own witness has substantiated the legal, constitutional infirmity of the result the IEPA requests. Before USEPA, as already noted, it is IEPA's job to 'sell' the result not subvert it. To pull some alleged USEPA position out at the eleventh hour like some deux ex machina to justify IEPA's result should simply be

unacceptable.

Beyond these infirmities, there are two responses to the implication IEPA would have the Board draw from 40 C.F.R. 51.19(c). The first response requires carefully considering the language of §51.19:

> Each plan shall provide for monitoring the status of compliance with any rules and regulations which set forth any portion of the control strategy. Specifically, each plan shall, as a minimum, provide for:...
>
> (c) Establishment of a system for detecting violations of any rules and regulations through the enforcement of appropriate visible emission limitations and for investigating complaints.

The introductory language refers to "control strategy" which, of course, is only necessary for regulated pollutants. Opacity, as EEI and IPC previously have pointed out, and as the Seventh Circuit recently noted, is not a regulated pollutant. It also refers to "monitoring" for compliance.

Examining sub-section (c) indicates USEPA recognizes this fact. It refers to "detecting violations of any rules and regulations through enforcement of appropriate visible emission limitations." Rules and regulations are 'violated;' rules and regulations are for regulated pollutants. The introductory language, "rules and regulations...of the control strategy," confirms this. The section does not reference "violations" of opacity, visible emission, because it is not a regulated pollutant, it is a mere surrogate.

More significantly for the present proceeding, are the terms "enforcement" and "appropriate" which are not defined. Is enforcement only the imposition of civil and criminal penalties, particularly where the enforcement is not for an opacity standard <u>per se</u> but is for "detecting violations of any rules and regulations." There are numerous other enforcement techniques. Section 51.19(c) at least as strongly

suggests opacity is no more than a surveillance ("detecting") technique, and not an independent basis for civil and criminal penalties. The Board's solution, allowing imposition of additional monitoring and reporting requirements for particulate emissions is consistent with this language, with "detecting" violations of rules and regulations.

Furthermore, the Board's approach is consistent with the term "appropriate." Section 51.19(c) nowhere mandates civil and criminal penalties for opacity. The language of the section, together with the fact that opacity is not a regulated pollutant, at least implicitly recognizes opacity as a mere surrogate. USEPA may well have used the "appropriate" language because it was aware there is no perfect correlation between opacity and particulates; one of the documents referenced in this record not only by EEI and IPC but also by IEPA is a USEPA document that specifically reaches that conclusion. Increased enforcement, through increased surveillance, monitoring or reporting is an "appropriate" use of visible emissions within the scope of §51.19.

Thus, a careful examination of §51.19(c) shows that the Board's approach is not inconsistent with that section.

Even if we were to accept the inference (as IEPA undertakes no analysis of §51.19) which IEPA apparently is suggesting, then the unavoidable conclusion is that §51.19 is invalid, not the Board's proposal. At the least based on the record before this Board, to make opacity subject to civil and criminal penalties is illegal and unconstitutional; if that is what §51.19 mandates, it - not the Board's regulation - is invalid. As conclusions of unconstitutionality are to be avoided if possible, and as a reasonable alternative interpretation of §51.19 exists, EEI and

IPC submit that the analysis presented above, not the IEPA's inference, is the proper interpretation.

With one exception, basically EEI and IPC do not disagree with the facts as stated by IEPA in paragraphs 3, 4 and 5 of its Second Motion. Most of the evidence concerning opacity focused on solid, fossil-fuel combustion sources. Those are the sources with which EEI and IPC are concerned. The exception is that EEI and IPC have no knowledge, on their own or from the record, what "all affected sources" includes; whether there are any other kinds of sources or how many there may be.

More significantly, IEPA having recited these facts, goes nowhere with them and EEI and IPC are uncertain what the point of the recitation is. If IEPA is suggesting exempting these sources from a civilly and criminally enforceable opacity provision, EEI and IPC would not object as that result is justified, in fact required by the record.

EEI and IPC, however, would note in passing that there is justification for the Board's broader approach. If the record lacks evidence on other kinds of sources it is because IEPA, and those other kinds of sources, presented no such evidence. On that basis there is no evidence to justify an opacity requirement for such other sources and the Board's result would be appropriate. EEI and IPC are reluctant to support a conclusion that a regulation is justified when there is no evidence to support it even if there is no opposition. Furthermore, although the evidence establishing the lack of correlation related only to solid fuel combustion sources, the Board is at least equally if not more justified in concluding that the same situation exists for other types of opacity sources rather than concluding that the opposite situation exists for those sources.

The IEPA has advanced no sound, legal or factual basis to support the revision to Section 212.123(a) it suggests in its Second Motion. That revision is not required by federal law or regulation and would be, if adopted, unjustified on the record and invalid.

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For the foregoing reasons, the Board should reject both of IEPA's motions.

Respectfully,

Electric Energy, Inc.
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